No. 80-2177

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

MARJORIE LEHMAN, on behalf of her children, WILLIAM LEHMAN, MARK LEHMAN and FRANK LEHMAN,

*Petitioners,*

—v.—

LYCOMING COUNTY CHILDREN'S SERVICES AGENCY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. WHETHER 28 U.S.C. §2254 VESTS FEDERAL DISTRICT COURTS WITH JURISDICTION TO ISSUE WRITS OF HABEAS CORPUS ON BEHALF OF MINOR CHILDREN WHO HAVE BEEN RENDERED WARDS OF THE STATE PURSUANT TO STATE INITIATED JUDICIAL PROCEEDINGS ENFORCING A CONSTITUTIONALLY DEFECTIVE STATE STATUTE.

2. WHETHER A BIOLOGICAL PARENT POSSESSES LEGAL CAPACITY TO SEEK A WRIT OF HABEAS CORPUS ON BEHALF OF HER NATURAL CHILDREN WHO HAVE BEEN DECLARED WARDS OF THE STATE PURSUANT TO CONSTITUTIONALLY DEFECTIVE STATE JUDICIAL PROCEEDINGS.

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MARJORIE LEHMAN, on behalf of her children, WILLIAM LEHMAN, MARK LEHMAN and FRANK LEHMAN,

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# BRIEF FOR PETITIONERS

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## OPINIONS BELOW

The opinions of the District Court for the Middle District of Pennsylvania and of the initial Panel of the Court of Appeals for the Third Circuit are unreported. The opinions of the en banc Court of Appeals for the Third Circuit

are reported at 648 F.2d 135. No other opinions have been rendered. The opinions below are reproduced in the Appendix to the petition for a writ of certiorari at pp. 1a-149a.

## JURISDICTION

The Court of Appeals for the Third Circuit entered a final order affirming the dismissal of petitioners' petition for a writ of habeas corpus on March 31, 1981. The petition for a writ of certiorari was filed in this court on June 24, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 9, Clause 2 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in Cases of Rebellion or Invasion the

public Safety may require it.

28 U.S.C. §2241 provides, in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> * * *
>
> (c) the Writ of habeas corpus shall not extend to a prisoner unless --
>
> * * *
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.
>
> * * *

28 U.S.C. §2254 provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State

court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this Section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

23 Pennsylvania Consolidated Statutes Annotated §2511(a)(Purdon Supp. 1981-82)

provides, in relevant part:[1]

> The rights of a parent in regard to a child may be terminated after a petition on any of the following grounds: . . .
>
> (2) the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and cause of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

## STATEMENT OF THE CASE

Petitioner, Marjorie Lehman, is the mother of five children. On July 23, 1976, the Court of Common Pleas of Lycoming County ordered the legal relationship with three of her five children permanently severed and directed that the children be placed in custody of an official agency of the County and Commonwealth, the Lycoming

---

1. This statute, effective January 1, 1981, replaced 1 Pennsylvania Statute §311 et seq. which was repealed. There are no substantive changes between these laws and, for convenience, petitioner will refer to the old section 311 throughout this brief.

County Children's Services Agency, pending adoption. The sole issue posed by this appeal is whether petitioner may seek federal habeas corpus relief on behalf of her biological children on the ground that Pennsylvania's decision to alter the legal and custodial status of her children by destroying a family was taken in violation of federal constitutional guarantees.

Petitioner does not seek to disturb the factual conclusions of the trial court. Nor does petitioner seek to review an exercise of judgment by the trial court. Petitioner recognizes that, ordinarily, the determination of facts and the application of law must - and should - remain the province of the trial court. Rather, petitioner seeks to challenge the jurisdiction of the trial court to proceed under a defective state statute which authorizes

the destruction of a family on unconstitutional grounds.

The termination order was issued pursuant to hearings held on May 4th and 7th, 1976. At the hearing it was shown that in June, 1971, petitioner, then a 39-year-old woman, was living with her three sons, (petitioners in this proceeding) then ages 7, 5 and 1, and was about to give birth to her fifth child. She was supported by social security, public assistance grants and food stamps. Because she had no one to care for her children during her hospitalization and because her living quarters were roach-infested and unfit for her children, she sought the aid of respondent Lycoming County Children's Services (hereinafter "the agency") for temporary foster care of the boys.

(Exhibit A, page 1.)[2]

Until that time, the children had been under petitioner's exclusive and continuous care and supervision. No report or adjudication of parental neglect had ever been made or entered against her and there is no suggestion in the record that her sons had ever been improperly cared for or mistreated while they were in her custody.

After petitioner gave birth to her daughter, Tracie, the agency offered her a small apartment suitable only for her and her new baby. After some hesitation she accepted, fully expecting larger quarters imminently so that she could be reunited

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2. This Court has granted petitioner's motion to dispense with the requirement of a Joint Appendix. References in text to "Exhibit A" refer to the Findings, Discussion and Order of the Court of Common Pleas of Lycoming County, Pennsylvania dated June 3, 1976 and annexed to the Petition for a Writ of Habeas Corpus as Exhibit A and part of the record in this case.

with her sons. (T.14)[3] A schedule of one-hour monthly visits with them in the agency's office was arranged, which the mother never missed. (T.16)

Initially the agency's plan with respect to the children was to seek their return to the mother by helping her to obtain adequate housing and providing nutrition aides to counsel her. (Exhibit A, p. 2.) In fact, however, the agency made no effort to reunite the family.

In 1974, after her sons were in foster care for more than three years, the mother requested that the boys be returned. The agency refused, concluding that the

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3. "(T.__)" refers to the Transcript of Proceedings in the Court of Common Pleas, Orphans Court Division, held on May 4 and 7, 1976. Because no hearing was held in the proceedings below, this transcript was not made a formal part of this record. A certified copy of the transcript has been lodged with the Clerk of this Court.

mother could not provide her sons with adequate care. After the mother obtained legal assistance to seek return of the children and increased visitation, the agency filed the petition to terminate parental rights to the three boys, not to her daughter Tracie. (Exhibit A, p. 3.)

A psychologist at the hearing gave her opinion that the mother lacked the social and intellectual maturity necessary to raise children and stated that the mother had a mental age of six years, ten months with the social skills of a twelve year old. (T.31)

Testimony at the hearing showed the mother was unable to rid Tracie of lace and that the aide himself had to achieve that result. (T.56-57) On several occasions the mother has had her heat and electricity terminated for her failure to pay the bills. (T.7) There was also evidence of the

mother's inability to handle her financial affairs and that she was frequently in debt. (T.58) Aides present during the court-ordered visitation described the visits as a "free-for-all." (T.11)

In addition, testimony at the hearing showed that all three boys were living in separate foster homes. (T.25-27) The oldest boy, Frank, has lived in four different foster homes. Other than at an annual agency picnic, the only time the boys saw each other was during visitation with the mother. Each of the boys testified that he enjoys seeing his brothers. (T.119, 123, 127) William, who was ten at the time of the hearing, testified that he liked visiting with his mother once in a while. (T.121) Frank, who was twelve at the time of the hearing, was asked by the Court about his feelings respecting his mother.

Q. Now, do you like the visits with your mother?

A. Uh-huh.

Q. How would you feel if they were to stop?

A. You mean not at all?

Q. Right.

A. I don't think I'd like that.

Q. Okay, and why is that?

A. Because I miss her a lot.

(T.130)

Further testimony showed that the foster parents with whom Frank was residing were not interested in adopting him and that there was, at that time, no plans for Frank to be adopted. (T.27) The foster parents of William "might adopt him" and the foster parents of Mark were interested in adoption. (T.25) At the conclusion of the hearing, the court made, inter alia, the following findings and conclusions:

1. Petitioner is able to handle the custody of Tracie. (Exhibit A, p. 2);

2. The three children in this proceeding are "healthy, active, alert youngsters." (Exhibit A, p. 3.) Although the mother loves her sons and wants them back and at least the two oldest return her affection, she "would not be able to provide intellectual or social stimulation for them, nor would she be able to channel and discipline their behavior." (Id.);

3. The mother, because of her income, finds it necessary to live in a low income project area, where, in the words of the probate court, "the demands upon a parent in properly supervising and disciplining his children are most extreme." (Id.);

4. By reason of petitioner's "very limited social and intellectual development combined with her five-year separation from the children, the mother is in-

capable of providing minimal care, control and supervision for the three children [and] her incapacity cannot and will not be remedied. (Exhibit A, p. 4);

5. "[T]he best interests of the children" would dictate that they remain in agency custody indefinitely." (Id.)

The court made no finding that petitioner had ever neglected or abused any of her children. Nevertheless, the court permanently terminated parental rights based upon 1 P.S. §311(2) which allows termination to be ordered on the grounds that:

> the repeated and continued incapacity, abuse, neglect, or refusal of the parent has caused the child to be without essential parental care, control, or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect, or refusal cannot or will not be remedied by the parent.

The result of the court's order was to terminate permanently the relationship between the mother and each of the three boys. Since the order, the boys have been wards of the state in three different foster homes. Unless adopted, each of the boys will remain legally without any parents.

The mother's constitutional challenge to this law was specifically rejected by the trial court. After final order of the Court of Common Pleas, an appeal was brought to the Pennsylvania Supreme Court where it was argued that a construction of 1 P.S. §311(2) which authorized the destruction of a family in the absence of a showing that a parent had failed to provide adequate child care in the past or that the boys would be exposed to serious and substantial harm in the future was violative of the Fourteenth Amendment. It was fur-

ther argued that the Pennsylvania standard of parental "incapacity [which] has caused the child to be without essential care, control or mental well-being" [1 P.S. §311(2)] is impermissibly vague both on its face and as applied.

With two justices dissenting, the Pennsylvania Supreme Court affirmed the termination order based on "parental incapacity, which does not involve parental misconduct." In re William L., 477 Pa. 322, 383 A.2d 1228 (1978). The majority held that the Legislature's power to protect the physical and emotional needs of children authorized termination in the absence of serious harm or risk of serious harm to the children and in the absence of any parental misconduct. 383 A.2d at 1234-37. It held also that the statute is not unconstitutionally vague either on its face or as here applied.

Justice Nix, dissenting, thought the termination order was unconstitutional for three reasons. First, he argued that the standard of harm to the children was too low to warrant the drastic step of involuntary termination under the Due Process Clause. Second, he argued, the standard of "parental incapacity" as applied and on its face is void for vagueness. Finally, he argued that a termination based upon a parent's involuntary condition or incapacity violated the Fourteenth Amendment. 383 A.2d at 1247-1252. Justice Manderino, also dissenting, argued that a faultless parent, involuntarily incapacitated, cannot constitutionally be subject to permanent termination of parental rights. 383 A.2d at 1252.

Timely review was sought in this Court by Petition for a Writ of Certiorari. This Court denied the petition with three

justices dissenting (Justices Brennan, White and Marshall). Lehman v. Lycoming County Children's Services Agency, 439 U.S. 880 (1978).

Thereafter, petitioner filed the instant proceeding on January 16, 1979, pursuant to 28 U.S.C. §§2241 and 2254 seeking: (a) a declaration that P.S. §311(2) is unconstitutional; (b) a declaration that petitioner is the legal parent of the children and (c) an order releasing the children to her custody unless within sixty days an appropriate state court judicially determines that the best interest of the children require that temporary custody remain with the state.

The district court dismissed the petition, without a hearing, in an opinion dated September 4, 1979. Relying primarily on Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978) the

court concluded "the custody maintained by the respondent over the three Lehman Children is not that type of custody to which the federal habeas corpus remedy may be addressed." (P. 147a.)[4] Furthermore, the court found "it is not clear that the welfare of children or families is promoted by permitting two sets of courts to litigate such matters." (P. 148a.) Timely appeal was taken to the Court of Appeals for the Third Circuit.

On July 13, 1980 a divided panel of the Court reversed the district court, holding that "federal habeas corpus jurisdiction may be invoked to challenge the constitutionality of a state statute by

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4. The district court opinion, and the two sets of opinions issued by the Court of Appeals, are printed in the Appendix to the Petition for a Writ of Certiorari. All references to P.___a refer to pages of that Appendix.

which the state has taken custody of children and has terminated without consent the rights of a natural parent to them." (P. 114a.) Lehman v. Lycoming County Children's Services Agency, No. 79-2466 (3d Cir. July 23, 1980), vacated and rehearing en banc granted (August 15, 1980).

After reargument, the en banc court affirmed the order of dismissal of the district court by a divided vote of six to four. No majority opinion was written by Judge Garth, who had dissented in the original panel, held that "disputes of the nature addressed here and which essentially involve no more than the question of who shall raise a child to maturity, do not implicate the federal interest in personal liberty sufficiently to warrant the extension of federal habeas corpus." (P. 24a.)

In support of this conclusion, Judge Garth reasoned that "(i)t is not the liberty interest of the children that is sought to be protected in such a case, but only the right of the particular parent to raise them." (P. 11a)(footnote omitted.)[5]

Judge Garth's opinion expressly recognized that certain claims of custody of children would be cognizable in habeas. Thus, he noted: "'Were [the Lehman boys] incarcerated in a state home, or were there other issues making this truly a struggle for liberty by one imprisoned under the aegis of the state'...the writ might well be available. We hold only that parental rights termination suits...

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5. In the footnote to this sentence, the opinion indicated that "each of the boys expressed a clear preference for not living with his mother." (Id.; n.6). Unfortunately, because this case was dismissed on the pleadings, Judge Garth was unaware of the boys' desire to visit with their mother.

do not without more, provide a predicate for the use of federal habeas corpus." (P. 19a)(emphasis deleted.)

A second plurality of four, in an opinion written by Judge Adams, held, inter alia, that "it does not appear that Mrs. Lehman has standing to assert [a habeas corpus] action on behalf of her three children." (P. 42a.) Judge Adams' opinion begins by noting that "the children have expressed a wish not to return." (P. 24a.)[6] In a later footnote Judge Adams, like Judge Garth, acknowledged that certain cases involving state custody of children may be

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6. Like Judge Garth, Judge Adams failed to recognize that unless parental rights are reinstated, the children have no right to visit with their mother or even with each other. Both pluralities overlooked the fact that the children did desire a continuation of the family relationship. At the very least, the matter should be remanded to the district court to inquire into the children's wishes and make findings of fact.

cognizable in habeas corpus: "Should the children be in state custody against their will, it is even possible that habeas would be an appropriate vehicle for the legal attack." (P. 36a, n. 35.) Reasoning that a successful constitutional attack on the state statute may not be in the best interests of the children, Judge Adams concluded: "Once a parent's rights are terminated, a parent is no longer presumed to represent the interest of the child." (P. 39a; footnote omitted.)

Chief Judge Seitz concurred specifically recognizing that this is "a most difficult case" and that "the literal statutory requirements for exercise of section 2254 federal habeas corpus jurisdiction can be said to be satisfied." (P. 43a.) However, he concurred with the result because "(t)here has been...a prolonged period during which there has been

an absence of relevant precedent" for this type of case going forward pursuant to habeas corpus jurisdiction. Chief Judge Seitz concluded that "it is not unreasonable to await congressional directive" before allowing such cases in federal court. (Id.)

Judge Rosen, writing for two other judges, dissented, noting that "(t)he total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children." (P. 59a.) Because "(i)n the instant case the state is directly involved, not only through its judicial action in the section 311 proceedings, but also by virtue of a county agency maintaining custody" (P. 53a-54a), Judge Rosenn concluded that "the requirements of the federal habeas corpus statute are met and federal habeas corpus

jurisdiction must be excercised unless there are compelling reasons to the contrary." (P. 68a.)

Judge Gibbons also dissented concluding that there is federal subject matter jurisdiction under 28 U.S.C. §§1331 and 1343(a). Judge Gibbons considered habeas corpus as relevant only as a remedy in aid of a court's jurisdiction and not as an independent source of federal subject matter jurisdiction. (P. 70a.)

At the current time, the boys, aged 17, 16, and 12, live in three different foster homes. None of the three boys has been adopted.

## SUMMARY OF ARGUMENT

Jurisdiction exists in this case by the plain language of the federal habeas corpus statute. Congress has chosen to maintain a collateral remedy to challenge restraint on physical freedom in arguable violation of federal constitutional law. This Court has never countenanced the complete

withdrawal of federal jurisdiction where such jurisdiction has been conferred upon the federal judiciary by Congress. Although the Court has developed standards which may delay access to congressionally authorized federal courts, there is no precedent for complete withdrawal of exercise of jurisdiction.

Petitioner, as the children's natural mother, clearly has the capacity to seek their release from unlawful custody. The court below confused the merits of the case with petitioner's capacity to bring the action. The children are in custody both within the literal terms of the statute and consistent with the historical use of habeas corpus. What makes this case different from cases in which this Court has rejected federal habeas corpus actions seeking the return of children is the presence of state action and, consequently, Fourteenth Amendment limitations. This case is wholly distinguishable from private custody dispute; it is the archetype of state action -- a

state initiated judicial proceeding and on-going state custody. The challenge in this case to an unconstitutional state law resulting in state custody would have been cognizable in habeas corpus even within the Nineteenth Century rule limiting challenges only to a court's "jurisdiction."

Finally, there are sound reasons to allow lower federal courts to consider constitutional challenges to state destruction of families. There are real dangers in this Court being the only available federal court to hear such claims. Lower federal courts can contribute to a meaningful dialogue with state courts in developing constitutional norms in this area. The availability of potential habeas corpus review may actually provide an incentive to agencies in having their wards adopted. It may be that an appropriate built-in limitation, on the reach of habeas corpus to challenge termination of parental rights decisions, is the ultimate adoption of the child.

## ARGUMENT

### POINT

**28 U.S.C. §2254 VESTS FEDERAL DISTRICT COURTS WITH JURISDICTION TO ISSUE WRITS OF HABEAS CORPUS ON BEHALF OF CHILDREN WHO HAVE BEEN RENDERED WARDS OF THE STATE BECAUSE THE LEGAL RELATIONSHIP BETWEEN A CHILD AND HIS NATURAL PARENT HAS BEEN SEVERED BY A STATE COURT.**

#### A. Introduction

When the state places physical restraints upon an individual, it exercises a fearsome power. Short of depriving an individual of life itself, restricting physical freedom is the most drastic sanction which the modern state can inflict.

The cornerstone of the Anglo-American struggle to rationalize and control the state's power to impose physical restraints on its subjects has been the procedural device of the writ of habeas corpus. Viewed functionally, there is nothing mystical

about the Great Writ. It is merely an assurance that a person whose physical liberty is being restrained will enjoy speedy and effective access to an independent judicial determination of the lawfulness of state imposed physical restraints.

In a federal system, a decision must be made whether to vest habeas corpus jurisdiction in the judges of the federal partner or to confine its exercise to the judges of the restraining authority. When the restraining authority is the United States, this Court has refused to permit state judges to exercise inherent habeas corpus jurisdiction in the absence of a grant of subject matter jurisdiction by Congress. E.g., Tarble's Case (U.S.), 13 Wall. 397 (1872); Ableman v. Booth (U.S.), 21 How. 506 (1857). When, however, the restraining authority is a state, Congress has forged a carefully considered compro-

mise. First, so long as the gravaman of the petition sounds in state law, Congress has directed that habeas corpus petitions be considered by a state judge.

Second, even when the petition raises questions of federal law, Congress has directed that the petition be considered by a state judge if there is any chance that a state court may rule in favor of the petitioner. When, however, stare decisis precludes state trial courts from serving as effective habeas corpus forums, Congress must either forego effective collateral protection of federal constitutional rights or utilize the Federal District Court as the only forum in which collateral review pursuant to habeas corpus would not be barred by stare decisis. Not surprisingly, given the historic importance of collateral review as a device to protect the individual against the possibility of abuse of power, Congress

has elected to utilize federal habeas corpus as an effective vehicle to protect personal freedom. Thus, in vesting habeas corpus jurisdiction in a Federal District Court, Congress denigrates neither the competence nor the integrity of the state judiciaries. Since habeas corpus is, by definition, a collateral remedy and since stare decisis would effectively block an application for collateral relief in a state trial court, the Federal District Court is, often, the only available habeas corpus forum. To deny a federal court power to entertain such a habeas corpus petition is to make the judgment that no effective collateral remedy need exist. Congress has explicitly refused to make such a judgment when a state restrains physical freedom in arguable violation of federal constitutional norms.

Prior to its decision in Stone v. Powell, 428 U.S. 465 (1976), this Court had never questioned Congress' decision to provide an effective collateral review mechanism in cases where a state may have unconstitutionally deprived a person of physical liberty.

In Stone v. Powell, this Court held that the unique remedial aspects of the judicially created exclusionary rule did not require an effective collateral review mechanism. When habeas corpus is used simply to deter wrongful police conduct and "deflects the truth finding process and often frees the guilty" 428 U.S. at 490, this Court has held that habeas corpus relief is unnecessary. The Court stressed that the decision to limit review was "not concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." 428 U.S. at 495 n. 37

(emphasis in original).[7]

Since, reasoned the Court in Stone, the principal purpose of the exclusionary rule is to remove any incentive to engage in an illegal search, so long as the police are aware that the legality of a given search will be fully and fairly reviewed during the direct appeal, the existence of a collateral review mechanism - state or federal - will not materially enhance the rule's deterrent effect. When, however, the availability of a collateral review would provide enhanced protection of a federal constitutional right, this Court, in the years since Stone v. Powell, has

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7. Stone merely limited the availability of "a judicially created remedy rather than a personal constitutional right." 428 U.S. at 495 n. 37.

respected Congress' decision to establish such an effective collateral review mechanism. See e.g., Jackson v. Virginia, 443 U.S. 307 (1979); Rose v. Mitchell, 343 U.S. 545 (1979).

Where, as in this case, petitioner seeks to challenge the substantive validity of a state statute pursuant to which her children have been rendered wards of the state, the need for an effective collateral attack mechanism as a procedural vehicle to safeguard personal liberty is at its apogee. Unlike Stone, a clear nexus exists in this case between the availability of an effective collateral review mechanism and the protection of a substantive Federal constitutional right.

Congress has made a judgment that collateral review is a significant protection of physical freedom. It is not the province of the judiciary to subvert that

judgment by the creation of discretionary judge-made limits on its availability where, as here, the plain meaning of 28 U.S.C. Section 2254 imposes a critically important jurisdictional responsibility. Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336 (1976).

Unfortunately, the plurality opinions below carry Stone to new and wholly indefensible lengths in refusing to permit petitioner access to an effective collateral review mechanism to challenge the constitutionality of Pennsylvania's decision to make her children wards of the state.

B. Jurisdiction Is Conferred On The District Court In This Case By The Plain Meaning Of 28 U.S.C. §2254

In the absence of a grant of subject matter jurisdiction by Congress, neither state nor federal courts are empowered to issue a writ of habeas corpus on behalf of

persons in the custody of the federal partner. E.g. Tarbles Case, supra. Conversely, once Congress establishes jurisdiction to entertain a habeas corpus petition, no court - state or federal - may decline to exercise its jurisdictional responsibility. E.g. Thermtron Products, Inc. v. Hermansdorfer, supra; Testa v. Katt, 330 U.S. 386 (1947). The jurisdictional issue raised by this case turns, therefore, not on an independent judicial determination of policy, but on deference to the will of Congress. This action falls squarely within the literal reach of federal statutory habeas corpus. Each statutory prerequisite for jurisdiction is met. The children are (1) in custody, (2) (allegedly) in violation of the Constitution or laws and treaties of the United States, (3) pursuant to the judgment of a State Court and (4) the State Court proceedings have been fully exhausted. 28

U.S.C. §2254(a) and (b).

Petitioner does not claim "that every person asserting a federal right is entitled to one unemcumbered opportunity to litigate that right in a federal district court, regardless of the posture in which the federal claim arises." Allen v. McCurry, 449 U.S. 90, 103 (1980). Instead, petitioner asserts that this case falls fully within "the scope of the jurisdiction of the federal courts [which has been left] to the wisdom of Congress." Id. Where, as here, the literal prerequisites for federal habeas corpus jurisdiction exist, the essentially unchecked exercise in legislature balancing engaged in by the plurality opinions below constituted an inappropriate exercise in judicial law-making.

In grappling with the jurisdictional issue, an unfortunate degree of confusion

emerged below. While no opinion commanded a majority of the Third Circuit en banc, a review of the plurality opinions reveals four, often interwined, bases for declining to entertain petitioner's application for a writ of habeas corpus.:

1. a judgment that a natural mother whose children have been made wards of the state lacks legal capacity to file a federal habeas corpus petition on their behalf;

2. a determination that a child who has been taken from its mother and made a ward of the state is not in custody within the meaning of federal habeas corpus review;

3. a fear that consideration of petitioner's application for habeas corpus relief in connection with state initiated termination proceedings would involve the federal

courts in intra-family disputes; and

4. a concern over the federalism implications of federal collateral review of a state judicial decision declaring a child a ward of the state.

In seeking to untangle the skeins of reasoning in the decisions below, the admonition by this Court in Davis v. Passman, 442 U.S. 228, 239 n. 18 (1979), that care be taken to differentiate between questions of standing, subject matter jurisdiction, the existence of a cause of action and the availability of a remedy is particularly apt. When each element is examined separately, the various concerns expressed by the plurality opinions below do not justify a refusal to carry out the plainly exprssed will of Congress.

1. Petitioner Possesses Legal Capacity To Seek Habeas Corpus Relief On Behalf Of Her Children.

There is no jurisdictional barrier to this lawsuit filed "on behalf of" or by "next friend" status of the mother. First, the children are incompetent to waive Constitutional claims on their own. cf. Gilmore v. Utah, 429 U.S. 1012 (1976). Only children and their parents have this capacity. See e.g., In re Gault, 387 U.S. 1 (1967). If, as the pleadings allege the children were unconstitutionally cut-off from their mother's relationship[8] plain sense indicates that the mother has the authority to indicate the children's rights to remain legally related to her. Indeed, the Federal Rules of Civil Procedure pre-

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8. A claim which must be taken as true for the purposes of this appeal since the action was dismissed on jurisdictional grounds without a hearing.

clude an infant from suing his in own behalf. Rule 17(c) expressly provides for an infant to sue by a guardian ad liten or next friend. As Judge Weinfeld has stated: "The term (next friend) is broad enough to include any one who has an interest in the welfare of an infant who may have a grievance or a cause of action." Child v. Beame, 412 F. Supp. 593, 599 (S.D.N.Y. 1976).[9] Without serious dispute, it must include the person who, if the litigation

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9. Another district court in New York declared more than 100 years ago: "It has never been understood that, at common law, authority from a person unlawfully imprisoned or deprived of his liberty was necessary to warrant the issuing of a habeas corpus, to inquire into the cause of his detention...In the Case of Ashby, 14 How. St. Tr. 814, the House of Lords, in England, in 1704, resolved 'that every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right by his agents or friends, to apply for and obtain a writ of habeas corpus, in order to procure his liberty by due course of law.' In re Ferrens, 8 Fed. Cas. 1158, 1159, no. 4, 746 (S.D.N.Y. 1869).

is successful, would again be made the children's legal parent.

In this case, a natural mother challenges the illegality of her permanent loss of rights as well as her children's illegal status as wards of the state. Whether one approaches the issue as an example of third-party standing or as a recognition of the intensity of the legal nexus which exists between parent and child, natural parents are routinely recognized as appropriate habeas corpus petitioners in cases seeking to protect the liberty interests of their children.[10]

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10. The recognition that parents may file habeas corpus writs on behalf of their children is simply one - and perhaps the paradigm - manifestation of this Court's recognition that a litigant may raise the rights of closely related third parties when it is unclear whether the third parties will be in a position to raise their own rights. E.g., Barrows v. Jackson, 346 U.S. 249 (1953)(white sellers may raise rights of prospective black purchasers);

Members of the plurality below, however, argued that the general rule permitting parents to raise the rights of their

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Footnote 10 (cont'd)

Taylor v. Louisiana, 419 U.S. 522 (1975) (male defendant may raise exclusion of women from jury); Peters v. Kiff, 407 U.S. 493 (1972) (white defendant may raise exclusion of blacks from jury); Eisenstadt v. Baird, 405 U.S. 438 (1972) (distributors of contraceptives may raise rights of potential users); Procunier v. Martinez, 416 U.S. 396 (prior inmates may raise rights of non-prisoner correspondents); Singleton v. Wulff, 428 U.S. 106 (1976) (doctor may raise rights of patients); Craig v. Boren, 429 U.S. 190 (1976) (vendors of 3.2 beer may raise rights of purchasers); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (corporate speakers may raise rights of potential hearers); Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, 425 U.S. 478 (1976) (commercial speaker may raise rights of consumers); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (same); Carey v. Population Services, Inc., 431 U.S. 678 (1977) (same); Duke Power Company v. Carolina Environmental Study Group, 438 U.S. 59 (1978) (homeowners may raise rights of potential victims). See generally, Sedler, Standing To Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962); Note, Standing To Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423 (1975).

children should not apply in settings where the parent-child relationship has been severed by the state. Since, it is argued, an unfit parents' interests diverge from - and may conflict with - the interests of her child, such a parent should not be permitted to invoke a child's legal rights to the child's factual detriment. (P. 39a.) Such a circular argument - characterized by the District Court as an exercise in "Catch 22" - ignores a fundamental distinction between standing and the merits which has been repeatedly articulated by this Court. The mere fact that a claimant may ultimately lose on the merits can not justify a dismissal on standing grounds. For example, in deciding whether the plaintiffs in Baker v. Carr, 369 U.S. 186 (1962) possessed standing to challenge the dilution of their voting rights caused by a malapportioned legislature, this

Court noted that:

> "it would not be necessary to decide whether appellants' allegations...will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it."

369 U.S. at 208.

Similarly, in Data Processing Service v. Camp, 397 U.S. 150 (1970), lower courts had declined, on standing grounds, to permit a manufacturer to challenge a regulation which subjected him to increased competition because he was unable to identify a "legal interest" which the regulation infringed. In rejecting the "legal interest" test for standing, this Court noted:

> "The 'legal interest' test goes to the merits. The question of standing is different."

397 U.S. at 153.

In Barlow v. Collins, 397 U.S. 159, 163 (1970), lower courts had denied standing to tenant farmers seeking to challenge

a regulation which permitted the assignment of crop support payments to secure payment of rent because the regulation did not "invade any legally protected interest of the plaintiffs." This Court reversed, noting that Data Processing had rejected the legal interest analysis because if confused the issue of standing with an analysis of the merits. In his concurrence in Barlow, Justice Brennan, joined by Justice White, explicitly attacked the "legal interest" test, noting:

> Barlow is a typical illustration of the harm that resulted from the requirement. The only substantial issue in that case goes to the merits: does the statutory language "making a crop" create a legally protected interest for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent. By confusing the merits with the plaintiffs' standing to challenge the Secretary's action, both the District Court and the Court of Appeals denied the farmers the focused and careful

> decision on the merits to which are clearly entitled."

397 U.S. at 168.

Similarly, criticism may justly be levelled at those aspects of the lower court opinion which held that petitioner lacks legal capacity to seek habeas corpus relief on behalf of her children because she is no longer their mother. It is, of course, a truism that an unfit parent should not be perceived as a spokesperson for a child. However, the very question at issue in this habeas corpus proceeding is whether Pennsylvania's determination of parental inadequacy should be given legal effect. To argue, as did several members of the Court below, that petitioner lacks legal capacity to challenge the constitutional underpinnings of her children's custodial status as wards of the state because she has been found to be an inadequate parent is to assume the legal valid-

ity of the very judgment which petitioner claims is constitutionally defective. As with the tenant farmers in Barlow, petitioner may be unable, after a consideration of the merits, to persuade a court that she retains a legally protected relationship with her children which entitled her to speak for them, but, no less than the tenant farmers in Barlow, she is entitled to a "focused and careful decision on the merits." 397 U.S. at 168.

2. Petitioner's Children Are In Custody Within The Meaning of 28 U.S.C. §2254.

a. Child Custody May Come Within The Statute.

Of the four criteria contained in 28 U.S.C. §2254[11] the only one found wanting

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11. 1) In custody, 2) in violation of the Constitution, 3) pursuant to the judgment of a state court, 4) whose proceedings has been fully exhausted.

by the plurality below, was the requirement that a person be "in custody."[12] As this Court has recognized on numerous occasions, "(i)n every case involving the construction of a statute, our starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979). Moreover, "(w)hen we find the terms of a statute unambigious, judicial inquiry is complete, except 'in rare and exceptional circumstances.'" Rubin v. United States, 449 U.S. 424, 430 (1981)(citations omitted).

"Custody" is defined as the "(j)udicial or penal safekeeping: control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it." Webster's Third New International Dictionary (1968).

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12. Judge Garth concluded that "(t)he 'custody' of a foster or adoptive parent over a child is simply not the type of custody that may be challenged through federal habeas." (P. 16a.)

With such a clear, unambigious term, examination of the historical meaning of custody is unnecessary.[13] In fact, however, habeas corpus has long been the vehicle to free individuals from illegal custody in a wide variety of situations unrelated to criminal settings[14] and in the child custody context.[15]

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13. Of all the terms in the habeas corpus statute, the term "custody" has been interpreted most elastically. Thus, the term has been broadened to include persons on parole from prison, Jones v. Cunningham, 371 U.S. 236 (1963); persons who have been unconditionally released from prison after the petition was filed, Carafas v. LaVallee, 391 U.S. 234 (1968); and to persons released on their own recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973).

14. See e.g., Ex parte Milligan (U.S.) 4 Wall. 2 (1866); see also, Billings v. Truesdell, 321 U.S. 542 (1944); Ex parte Endo, 323 U.S. 283 (1944); Shaughnessy v. Pedreiro, 349 U.S. 48 (1955); Brownell v. Tom We Shing, 352 U.S. 180 (1956); Parisi v. Davidson, 405 U.S. 34 (1972); Strait v. Laird, 406 U.S. 341 (1972).

15. As this Court recognized as long ago as 1885, habeas corpus may be extended to cases involving "children withheld from

Footnote 15 (cont'd)

their proper parent or guardian." Wales v. Whitney, 114 U.S. 564, 571 (1885). In accordance with this principle, numerous lower federal courts have allowed habeas corpus challenges on behalf of children in state custody in a variety of non-criminal contexts. See e.g., Davis v. Page, 640 F.2d 599 (5th Cir. 1981) (en banc), pet. for cert. pending sub.nom, Chastain v. Davis, No. 80-1888 (children in state supervised foster home) (child neglect proceedings); Smith v. Edmiston, 431 F. Supp. 941 (W.D. Tenn. 1977) (child neglect and dependency proceedings); Anh v. Levi, 427 F. Supp.1281 (E.D. Mich 1977), aff'd 586 F.2d 625 (6th Cir. 1979) (dismissal for failure to exhaust state remedies) (child custody); Mercado v. Rockefeller, 502 F. 2d 666 (2nd Cir. 1974) cert. den., 420 U.S. 925 (1975) (challenge to legality of confinement of girl who was adjudicated a Person In Need of Supervision and placed in a training school); Heryford v. Parker, 396 F. 2d 393 (10th Cir. 1968) (habeas petition brought by mother of mentally deficient son who had been committed to state training school for feeble-minded and epileptic). See also, United States ex rel. Cobell v. Cobell, 503 F. 2d 790 (9th Cir. 1974), cert. denied, 421 U.S. 999; Application of Reed, 447 F.2d 814 (3d Cir. 1971); Wisconsin Potowatomis v. Wilsey, 377 F. Supp. 1153 (M.D. Fla. 1974) (requiring exhaustion of state remedies); Young v. Minton, 344 F. Supp. 423 (W.D. Kent. 1972).

The Habeas Corpus Act of 1679, 31 Car. II, Ch. 2 and the "decisions of the English courts interpreting it have been accepted by this court as authoritative guides in defining the principles which control the use of writ of federal courts." McNally v. Hill, 293 U.S. 131, 136 (1934).[16] The English common law writ of habeas corpus could be used whenever a child was in the possession of one not legally entitled to

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16. Recognizing that the framers of the Constitution were also responsible for the original habeas corpus statute, §14 of the Judiciary Act of 1789, ch. 20, 1 Stat. 73, this Court nearly, one hundred years ago, explained the reasoning behind reliance on English precedents as follows:

> The general principles upon which the writ of habeas corpus is issued in England were well settled by usage and statutes long before the period of our national independence, and must have been in the mind of Congress when the power to issue the writ was given to the courts and judges of the United States.

Ex parte Parks, 93 U.S. 18, 21 (1886).

custody. Accord, Sokol, Federal Habeas Corpus 73 (2d Ed. 1969); Note, Habeas Corpus: Custody of Infant, 15 Cent. L.J. 281, 282 (1882). As recognized in Jones v. Cunningham, 371 U.S. 236, 238-9 (1963):

> the King's Bench as early as 1722 held that habeas corpus was appropriate to question whether a woman alleged to be the applicant's wife was being constrained by the guardians to stay from her husband against her will. The test used was simply whether she was 'at her liberty to go where she please(d).

(citing Rex v. Clarkson, 1 Str. 444, 445, 93 Eng. Rep. 625 (K.B. 1722).[17] Consistent with this history, when Congress dramatically expanded statutory federal habeas corpus in 1867, Act of February 5,

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17. As Judge Rosenn indicated in dissent, this line of cases may not be dispositive of whether federal jurisdiction should be exercised, but "it does provide support for the conclusion that the statutory prerequisite of 'custody' has been satisfied. (P. 52a, n. 5.)

1867, Ch. 28, S.1, 14 Stat. 385, it sought "legislation [ ] necessary to enable the Courts of the United States to enforce the freedom of the wives and children of soldiers of the United States." Cong. Globe, 39th Cong. 1st Sess. 87 (1866).[18]

b. Petitioner's Children, As Wards Of The State, Are Subject To Restraints On Physical Freedom Which Justify The Availability Of Habeas Corpus Relief.

Federal habeas corpus is designed as an additional procedural check on state imposition of physical constraints. The Great Writ's preoccupation with physical freedom is mirrored in the requirement of 28 U.S.C. §2254 that the person on whose

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18. This is actually a quote from the legislative history of House Bill No. 605 which, this Court recognized in Fay v. Noia, 372 U.S. 391, 416-417 (1963), became, with slight changes, the Act of February 5, 1867.

behalf a habeas corpus petition is filed must be in custody. In applying the custody provisions of 28 U.S.C. §2254 to children, an inherent anomaly exists since, strictly speaking, a child is never free of privately imposed physical restraints during its minority. Parental, or some other form of societally sanctioned, control exists over all children. E.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). The confusion engendered by such an anomaly led several members of the Court below to hold that a child who, after being declared a ward of the state, is placed in a foster home pending further action by the state is under no greater physical restraint than a child living with his natural parents. Accordingly, reasoned members of the plurality, a ward of the state is not in custody within the meaning of habeas corpus. (Pp. 13a, 16a.)

The confusion inherent in the plurality's approach to the custody issue is emphasized by its concession that a child who is unhappy with his placement might well be entitled to seek habeas corpus relief on his own behalf -- although it is somewhat unclear how such an unhappy child would make himself heard in federal court -- and by its concession that a child in a state institution, as opposed to a foster home, might well be in custody. (P. 19a.) More fundamentally, the plurality's approach ignores the key difference between parental control and state wardship - the displacement of individual autonomy by state power.

In place of private decisions concerning the welfare of a child, the state now asserts the power to decide where and with whom a child shall live and reserves the right to move the child to a new physical setting at will. The exercise of such un-

restricted power over the physical status of a child may, of course, be justified. Indeed, it may even be required. However, because the state may be entitled, and even obligated, to impose a benign form of custody in a child's best interest does not render the physical control any less dramatic.

The issue in this case is the constitutionality of the state statute which changed the status of the children's custody. Thus, the challenge is to the condition or quality of their custody as wards; not to their custody with the state vel non. In a similar context, this Court has on numerous occasions recognized the reach of habeas corpus to challenge custody in cases where the petitioner would be nonetheless remain "in custody" even if successful. See e.g., In re Bonner, 151 U.S. 242 (1894); Johnson v. Avery, 393 U.S. 483 (1969);

Humphrey v. Cady, 405 U.S. 504 (1972); Note, Developments in the Law-Habeas Corpus, 83 Harv. L. Rev. 1038, 1077-1087 (1970).

There can be little doubt that when the state asserts total power over the future of a child by dissolving his family relationships, and declaring him a ward of the state, it has imposed total control over his physical freedom which warrants the invocation of habeas corpus as a collateral remedy designed to safeguard personal liberty from state encroachment. The concept of custody as it is used in habeas corpus is not a legal conclusion. Rather, it is a factually based, descriptive term connoting the imposition of state control over an individual's present and/or future freedom of movement. The plurality's analysis, by treating custody as a legal conclusion which covers some, but not all, state restraints on freedom of movement,

would severely weaken habeas corpus as a procedural guaranty. The essence of the writ has always been its freedom from question-begging exceptions to its availability.

Moreover, in treating custody as a legal conclusion rather than a factual event, the plurality ignored the recent decisions of this Court. In Jones v. Cunningham, 371 U.S. 236, 240 (1963), this Court ruled that the state exerted sufficient restraint on the physical freedom of a parolee to warrant habeas corpus review reasoning that the writ is available whenever "there are...restraints on a man's liberty, restraints not shared by the public generally, which would have been thought sufficient in the English speaking world to support the issuance of Habeas Corpus." In Hensley v. Municipal Court, 411 U.S. 345 (1973), the Court ruled that a person free

on his own recognizance awaiting execution of a future sentence is in custody for the purposes of federal habeas corpus review.

In Strait v. Laird, 406 U.S. 341 (1970), custody was broadened to persons on unattached, inactive, army reserve duty. Surely, a child who is wholly within the power of the state and whose future will be controlled by the state to the finest detail is subject to at least as much state control as a person free on personal recognizance. See also, Carafas v. LaVallee, 391 U.S. 234 (1968).

3. Petitioner's Cause of Action, Whick Seeks Relief From A State Initiated Termination Proceeding Resulting In State Custody, Does Not Extend To Intra-Family Disputes.

The essence of federal habeas corpus jurisdiction is the protection of physical liberty from unconstitutional governmental

restraint. Where, as here, a habeas corpus petitioner alleges that an agency of the state has commenced a formal judicial proceeding which has resulted in the placement of her children in ongoing state custody, the requisite governmental involvement in the imposition of physical restraint is clearly present. Moreover, where, as here, a habeas corpus petitioner presents a persuasive claim that the statute which granted jurisdiction to the state court violates federal constitutional standards, a classic claim for habeas corpus relief has been stated which pre-dates the modern expansion of the concept of "jurisdiction." See e.g., Moore v. Dempsey, 261 U.S. 86 (1923); Johnson v. Zerbst, 304 U.S. 458 (1938).

This case would be cognizable under the earliest test of habeas corpus, allowing challenges to custody only when the

committing court was not possessed of jurisdiction over the habeas petitioner. E.g., Ex parte Kearney (U.S.), 7 Wheat 38 (1822); Ex parte Watkins (U.S.), 3 Pet. 193 (1830). In Ex parte Siebold, 100 U.S. 371, 376 (1879) this Court recognized that "an unconstitutional law is void and is as no law...A conviction under it is not merely erroneous, but it is illegal and void." See also, In re Snow, 120 U.S. 274 (1887); Nielson, Petitioner, 131 U.S. 176, 182 (1889): "if the Court which renders a judgment has not jurisdiction to render it [ ] because...the law under which they are taken (is) unconstitutional...the judgment is void and may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged from custody on habeas

corpus."[19]

Despite the apparent existence of a classic habeas corpus claim, several members of the plurality declined to exercise jurisdiction because they feared that consideration of petitioner's claim would involve the Federal courts in intra-family disputes over child custody. However, such a fear overlooks the basic distinction between state initiated proceedings resulting in ongoing state custody, which fall within the scope of federal habeas corpus jurisdiction, and privately initiated proceedings resulting in private custody, which do not. Indeed, the paradigmatic state initiated proceeding which results in state ongoing custody is a

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19. Because this case involves a challenge to the legality of the law underlying the detention, the case involves more the collateral impeachment of a void judgment than the inapplicability of res judicata. See Fay v. Noia, 372 U.S. 391, 423 (1963).

criminal prosecution: "This Court's decisions establish that a state criminal [or termination] trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment." Cuyler v. Sullivan, 446 U.S. 335, 343 (1980). The distinction between privately and state initiated proceedings flows from the statutory requirement, codified in 28 U.S.C. §2254, that the challenged custody must be in violation of the Constitution of the United States. While certain provisions of the Constitution operate on private behavior, the bulk of the Constitution's strictures operate only on "state action." Accordingly, private custody in the absence of the requisite state action - even if unlawful and, thus, cognizable in common law habeas corpus - does not rise to the level of unconstitutional

activity and would not give rise to a federal habeas corpus claim. In re Burrus, 136 U.S. 586 (1890); Doe v. Doe, ___ F.2d ___, 50 U.S.L.W. 2197 (4th Cir. 1981); Tree Top v. Smith, 577 F.2d 519 (9th Cir. 1978).

In this case, the requisite state action is supplied, first, by the undisputed role of the state as the initiator of the challenged judicial proceedings and, second, by the state's role as ongoing custodian of petitioner's children. In an intra-family dispute, neither indicia of state action is present. Intra-family disputes are, ordinarily, privately initiated and, ordinarily, will result in private custody. For these reasons, intra-family disputes are not cognizable in federal habeas corpus.

As this Court noted in Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978), when private persons act pursuant to state

authorization rather than state control, their conduct is not automatically translated into state action. When two private individuals dispute the custody of a child, submission of the dispute to judicial resolution does not render the private parties agents of the state. Lugar v. Edmondson Oil Co., Inc., 639 F.2d 1058 (4th Cir. 1981); Dahl v. Akin, 630 F.2d 277 (5th Cir. 1980). The assumption of custody by one such private party pursuant to judicial authorization is no more state action than was the legislatively authorized activity of the warehouseman in Flagg Bros. When, however, the state is the active agent in initiating the termination proceeding and when the state is the child's ongoing custodian,

the requisite state action is clearly present.[20]

Indeed, the two most frequently cited Supreme Court cases concerning federal jurisdiction over domestic relations cases are examples of the self-limiting reach of federal habeas corpus jurisdiction. In

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20. A troublesome jurisdictional issue, which is not presented by this case, might arise in settings where the state had initiated the termination proceeding, but where ongoing state custody has been ended by adoption. Whether a natural parent may challenge a completed adoption pursuant to federal habeas corpus raises serious questions of power and policy. While the fact of state initiation might satisfy the state action requirement, the absence of ongoing state custody caused by the transfer of legal custody to the adoptive parent might well eliminate the requisite state action. See Sylvander v. New England Home for Wanderers, 584 F.2d 1103 (1st Cir. 1978). Moreover, whether or not state action exists in a technical sense, the expiration of state custody might well moot a challenge sounding in federal habeas corpus. cf. Carafas v. LaVallee, 391 U.S. 234 (1968). See, infra at 87.

Where, as here, the state has initiated the termination proceedings and retains custody over the children, no similar issues exist.

In re Burrus, 136 U.S. 586 (1890) this Court dismissed a writ of habeas corpus brought by a father seeking to recover custody of his child from the grandparents. In dismissing the writ, the Court noted:

> In order to obtain the benefits of this writ and to procure its being issued...it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States.

136 U.S. at 591. In Burrus, dismissal of the writ was required because "there was no pretense that the child was restrained of its liberty...under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States." 136 U.S. at 593. Burrus thus stands for the proposition that federal courts have power to

decide habeas corpus cases only "when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ." 136 U.S. at 596-97.

In the second case, Matters v. Ryan, 249 U.S. 375 (1919) a Canadian mother petitioned for the release of her child from the custody of an American woman. Matters reaffirmed the truism that "the jurisdiction of the courts of the United States to issue writs of habeas corpus is limited to cases of persons alleged to be restrained of their liberty in violation of the Constitution or of some law or treaty of the United States." 249 U.S. at 377. Because the case involved only an "unsubstantial and frivolous" federal claim, the writ of habeas corpus was dismissed. Id. As observed by one commentator, "these two decisions do little but state the obvious

truth that a petitioner who claims his child is being held in custody violative of federal law must present a substantial federal claim before a federal court is empowered to issue a writ of habeas corpus." Note, The Use of Federal Habeas Corpus in Child Custody Disputes, 31 Maine L. Rev. 265, 275 (1980).

Consistent with this reasoning, this Court has on numerous occasions imposed and delineated the constitutional limits of state interference with the family and parents. See e.g., Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); Prince v. Massachusetts, 321 U.S. 158 (1944); May v. Anderson, 345 U.S. 528 (1953); Griswold v. Connecticut, 381 U.S. 479 (1965); Loving v. Virginia, 388 U.S. 1 (1967); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin

v. Yoder, 406 U.S. 205 (1972); Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Quilloin v. Walcott, 434 U.S. 246 (1978); Zablocki v. Redhail, 434 U.S. 374 (1978); Caban v. Mohammed, 441 U.S. 380 (1979).

Only this Term, we were reminded that "(n)otwithstanding the limited application of federal law in the field of domestic relations generally...this Court, even in that area, has not hesitated to protect, under the Supremacy Clause, rights and expectancies established by federal law against the operation of state law, or to prevent the frustration and erosion of the congressional policy embodied in the federal rights." Ridgway v. Ridgway, ___ U.S. ___, 50 U.S.L.W. 4001, 4008 (1981).

4. Petitioner Seeks Narrowly Defined Relief Which Does Not Interfere With Legitimate State Interests.

Pennsylvania has no legitimate state interest in dissolving salvageable families. All agree that children are best served by re-uniting them, if possible, with their natural parents. Conversely, Pennsylvania is properly concerned that children in non-salvageable families be provided an opportunity to experience adoptive family life. Unfortunately, Pennsylvania's statute fails to distinguish adequately between salvageable and non-salvageable family units and, as construed by a majority of the Pennsylvania Supreme Court, authorizes the destruction of families without any showing of need.

Petitioner seeks narrowly drawn relief requiring Pennsylvania to apply con-

stitutionally acceptable standards to its determination of whether her family is salvageable. Once such minimum standards are in place, petitioner recognizes that the task of applying them rests solely with the Pennsylvania state courts. Thus, the ultimate issue of whether petitioner should remain as the parent of her children must be decided, not by a federal judge, but solely by the courts of Pennsylvania.[21]

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21. Whether the children would go back to live with their mother is not a proper question for federal resolution and is not involved in this case. See Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976). English Common law has an interesting parallel which bears on this concept. Common law habeas corpus had only the authority to consider the legal issues in a case and to address illegal custody. Rex v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763). The question of the child's best interests was reserved for Chancery court resolution as an exercise of parens patriae. Note, The Use of Federal Habeas Corpus in Child Custody Disputes, 31 Maine L. Rev. 265, 271 (1980).

However, the threshold question of whether Pennsylvania is utilizing constitutionally acceptable standards in making that decision is a shared responsibility of both the state and federal judiciaries. While the federal contribution to resolving the issue could be confined to appellate review in this Court, Congress has quite properly recognized that the escalating demands on the attention of this tribunal render it increasingly unlikely that this Court can play an effective role as the sole contributor to the resolution of such a shared state/federal problem.

Chief Justice Burger and other Justices have called particular attention to the fact that the Court has insufficient time to give its attention to cases worthy of review. As Justice Stevens recently said, it would be incorrect to "infer that we have more than enough time

to dispatch our more important business." Great Western Sugar Co. v. Nelson, 442 U.S. 92, 94 (1979)(Stevens, J., dissenting).[22] See also, Watt v. Alaska, ___ U.S. ___, 49 U.S.L.W. 4433 n. 1 (1981)(Stevens, J. concurring).

Accordingly, Congress has chosen to utilize the Federal District Courts to assure an effective federal judicial voice in the elaboration of constitutional standards. Indeed, were the federal presence to be confined to appellate review in this

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22. Indeed, this very case graphically makes this point. In this case petitioner timely presented her case for review before the Supreme Court only to have the Court deny certiorari with three justices dissenting, 439 U.S. 880 (1978), apparently, according to Justice White, for the simple reason that the Court is "performing at (its) full capacity, i.e., [it is] now extending plenary review to as many cases as (it) can adequately consider, decide and explain by full opinion." Brown Transport Corp. v. Atcon, 439 U.S. 1014, 1023 (1978) (Justices White and Blackman dissenting from denial of certiorari). See, 439 U.S. at 1021.

Court, the enunciation of federal constitutional norms would cease to be a shared responsibility of both the state and federal judiciaries and would instead, revert to a state responsibility, subject to sporadic and, of necessity, arbitrary intervention by this Court. This Court's decision in Moore v. Sims, 442 U.S. 415 (1979), precluding federal judicial intervention in pending custody proceedings, and Allen v. McCurry, 449 U.S. 90 (1980), casting doubt on the efficacy of 42 U.S.C. §1983 as a mechanism to permit federal judicial comment on a completed state custody proceeding, leave 28 U.S.C. §2254 as the only practical vehicle by which the federal judiciary may exercise its shared responsibility. If the plurality opinions below are affirmed, no effective federal judicial presence will exist in the critical area of the state's power to

destroy a family, except for the possibility of appellate review by an overburdened Supreme Court. Moreover, given this Court's decision in Lassiter v. Dept. of Social Services, 452 U.S. ___, 68 L.Ed.2d 680 (1981), the complex and expensive responsibility of prosecuting such an appeal may be the task of an uncounselled and impoverished parent.[23] It is, of course,

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23. The Court's recent decision in Lassiter v. Department of Social Services, 452 U.S. ___, 68 L.Ed.2d 640 (1981) virtually compels the conclusion that at least certain claims of unconstitutional termination proceedings must be cognizable in federal habeas. By applying the Betts v. Brady, 316 U.S. 455 (1942), standard for the first time in a context outside of an ordinary criminal proceeding, this Court recognized the similar substantive constitutional protection available to parents in state initiated termination proceedings. This recognition requires the availability of similar procedural remedies. As Justice Blackman observed in Lassiter, case by case review of the fairness accorded to uncounselled parents in termination proceedings, "will result in increased federal interference in state proceedings." 68 L.Ed.2d at 665.

possible to argue that the exclusion of the lower federal judiciary from the process of sharing in the enunciation of constitutional doctrine in this area is wise as a matter of federalism and judicial economy. While such an argument should be directed to Congress, not the federal courts, even if one considers whether a shared state/federal judicial presence is wise, the value of a federal

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Footnote 23 (cont'd)

For the reasons shown above, it is extremely unwise for this Court to be the only federal court available for this review. This would be unfair to uncounselled parents, even assuming their capability of perfecting an appeal, unless the Court committed itself to review carefully all petitions brought to it alleging due process violations in termination proceedings. But if this Court were to become a "super-family-court," 68 L.Ed.2d at 665, it would be doing so at a significant cost to the nation. In a not unrelated context, Justice Stevens recently pointed out the inadvisability of any particular issue, even capital punishment, taking up a disproportionate percent of this Court's docket. Coleman v. Balkam, ___ U.S. ___, 49 L.W. 3808 (1981)(concurring in the denial of certiorari).

judicial contribution is obvious. See, Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 88 Yale L.J. 1035 (1977). The constructive dialogue which a shared state/federal responsibility should trigger is evidenced by Alsager v. District Court, 406 F. Supp. 10 (D. Iowa 1975) aff'd in part, 545 F.2d 1137 (8th Cir. 1976), and Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976)(3 judge-court).

The reciprocal influence of federal and state judicial contributions to the enunciation of constitutional norms involving the destruction of a family is a tribute to the vibrancy of judicial federalism. As one state court said in discussing Alsager, shortly after it was decided:

> reference must be made to what is rapidly becoming the most cited case on this issue in recent years. That this holding may bear staggering ramifications...is illustrated by the fact that all parties to this litigation made reference to it...

Matter of J.R., 84 Misc.2d 900, 903-04, 386 N.Y.S.2d 774, 777-78 (Fam. Ct. Bronx Cty. 1976).[24]

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24. State courts which have discussed and been influenced by the federal judicial contribution to the solution of the problem include: Davis v. Smith, 266 Ark. 112, 122-23, 583 S.W.2d 37, 43-44 (1979); In re Terry D., 83 Cal. App.3d 898, 899, 148 Cal. Rptr. 221, 226 (1978); Matter of Robert P., 61 Cal. App.3d 310, 317-320, 132 Cal. Rptr. 5, 9-11 (1976); Long v. Long, 255 N.W.2d 140, 143 (Iowa 1977); Beebe v. Chavez, 226 Kan. 591, 597, 602 P. 2d 1279, 1285 (1979); Matter of Trapp, 593 S.W.2d 193, 202 n. 10 (Mo. 1980); Tucker v. Marion County Department of Public Welfare, 408 N.E.2d 814, 819 n. 5 (Ind. App. 1980); In Interest of Wall, 295 N.W. 2d 455, 457-58 (Iowa 1980); Matter of Five Minor Children, 407 A.2d 198, 199 n. 5 (Del. 1979), app. dism. for want of a properly presented federal question, Doe v. Delaware, ___ U.S. ___, 49 U.S.L.W. 4250 (1981); Oregon v. Mills, 52 Or. App. 777, 629 P.2d 861, 865 n. 7 (1981); In the Interest of Brooks, 228 Kan. 541, 545, 618 P.2d 814, 819-20 (1980); In re Interest of J.L.L., 306 N.W.2d 175, 180 (Neb. 1981); Matter of Keyes, 574 P.2d 1026, 1028-29 (Okla. 1978); In re Aschauer's Welfare, 93 Wash. 2d 689, 696-98, 611 P.2d 1245, 1249-50 (1980); Sanchez v. Texas Department of Human Resources, 581 S.W.2d 260, 267 (Civ. App. 1979); In Interests of Hochmuth, 251 N.W. 484, 489 (Iowa 1977); Jacobson v. V.S., 271 N.W.2d 562, 567 (N.D. 1978); Matter of L.M.T., 305 N.W.2d 399, 403 (S.D. 1981).

Unfortunately, this Court's decision in Moore v. Sims, supra, cut short the federal judicial contribution of Alsager and Roe. If, however, the decision of the Third Circuit is reversed, a federal voice in the dialogue will, once again, be possible. This Court would then be free to play its optimal role of mediating the dialogue at an appropriate point in its evolution.

As already seen, the decision in Stone v. Powell to delete Fourth Amendment claims from federal habeas corpus was made expressly because of the disutility of extending the exclusionary rule that far. Stone v. Powell, 428 U.S. at 486-495 (1976). Seen in another context, the value served by allowing the claims of unlawful Fourth Amendment seizures to be cognizable in federal habeas corpus for the fifteen year period from the decision in

Mapp v. Ohio, 367 U.S. 643 (1961), until the decision in Stone had been fully realized. By the time Stone was decided, federal courts had played a prominent, and measurable, role in shaping and assuring allegiance to federal constitutional rights in the area of Fourth Amendment protection. Indeed, it is indisputable that the mere availability of federal habeas review of criminal proceedings had impacted very favorably on state courts. As Justice O'Connor recently wrote prior to her elevation to this Court:

> Every state court trial judge realizes, of course, the federal constitutional challenges will be raised in almost every state criminal case and that, after the state appellate review is exhausted, further review will be attempted in the federal courts. As a result, state courts in urban areas have tended to assign certain judges to hear only criminal cases in order that they may become more familiar with applicable state and federal, substantive and procedural, criminal constitutional law...There is a keen awareness among state court judges in

> state criminal cases of the federal constitutional protections of the defendant.

O'Connor, Trends In the Relationship Between the Federal and State Courts From the Perspective of a State Court Judge, 22 Wm. & Mary L. Rev. 801, 802 (1981).

The usefulness of review of Fourth Amendment violations in federal habeas may well have ended by 1976. In the area of state initiated proceedings which permanently destroy a family however, the constitutional rules are only beginning to be shaped. Barring issues raised in this case from habeas corpus jurisdiction precludes federal courts from participating in a dialogue which is still only being developed.

Finally, exercise of federal habeas corpus jurisdiction on behalf of children who have been made wards of the state would not adversely affect the children. Since all are agreed that, if possible,

restoration of the biological family is in the best interests of all concerned, a judicial proceeding designed to assure that minimal constitutional standards have been applied in deciding to dissolve a biological family will act to protect the interest of all. It is argued, however, that once a decision to terminate a parent-child relationship is made, the best interests of the children dictate speedy resolution of their legal status to permit adoption, if possible. To the extent a collateral federal remedy is recognized, it is argued, children will be held in limbo to their ultimate detriment. Of course, such an argument assumes that a habeas corpus petition will be unsuccessful on the merits and, thus, act solely to delay a possible adoption. If, on the other hand, the habeas corpus petition is successful and ultimately effects the reconciliation of a

biological family, the benefit to a child is a clear one. Moreover, given the unfortunate delay which currently exists throughout the nation between termination and adoption, as well as the difficulty in finding adoptive parents for teen age foster children, the prosecution of an expeditious habeas corpus proceeding will not, in many cases, serve to delay an adoption. See, Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 835-838 (1977); D. Fanshel & B. Shinn, Children In Foster Care - A Longitudinal Investigation (1978).

In those rare cases where adoption is a real possibility and would be delayed by a pending federal habeas corpus proceeding, a doctrinal safety valve exists which would permit the exercise of habeas corpus jurisdiction to be terminated as moot at the point where adoption ends state cus-

today. Syrovatka v. Erlich, 608 F.2d 307 (8th Cir. 1979); cf. Carafas v. LaVallee, supra. See, supra at 67. Indeed, by exposing a termination proceeding to federal habeas corpus review only until an adoption is actually effected, a welcome inducement to speedy action would be introduced into a process which, until now, has been characterized more by foot dragging than by expedition. While petitioner does not suggest that such a finding of mootness would be compulsory, it would, however, permit a federal judge to make a careful decision as to whether a child's interest would be advanced by the continued prosecution of the habeas corpus petition, just as the Eighth Circuit recently did in Syrovatka v. Erlich, supra.

If this Court determines that habeas corpus is unavailable, the Commonwealth of Pennsylvania will have permanently de-

stroyed a family relationship -- affecting rights "far more precious than property rights," May v. Anderson, 345 U.S. 538, 542 (1953) -- without any federal court review of the merits even where there exists a substantial claim that the state action and resultant state custody is unconstitutional. The rights involved in this case, considered "essential," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541 (1942), compel access to a federal forum.

## CONCLUSION

For the above stated reasons, petitioner prays that the judgment and order of the United States Court of Appeals for the Third Circuit be reversed and the case be remanded to the District Court for

determination on the merits of petitioner's claims.

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